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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

Nos. 764 and 765

ALFRED FENTON,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent,

RUSSELL G. SMITH,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

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INDEX.

	Page
Petitioner's reply to brief in opposition	1

Table of Cases.

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324	2, 3, 4
Cheney v. *Richards*, 155 A. 642	5
Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418	2, 3
Hayes v. *Fischer*, 102 U. S. 121	4
Robertson v. *State*, 104 So. 561	5

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This reply brief is filed because respondent in his brief in opposition, except in one instance, confuses the issues presented in petitioners' applications for a writ of certiorari with those in the proceeding out of which the alleged contempt arose. The questions involved in the so-called "principal action," such as the question of whether interstate commerce in that proceeding goes to jurisdiction or to

merits, are not here in issue. The single exception to respondent's studious effort to confuse the contempt proceedings with the "principal action" is found in footnote 13, on page 15 of respondent's brief. Respondent there states:

> "Their [petitioners'] reasoning seems to be that the contempt proceeding is an entirely separate and independent action (br. in support of pet., p. 12), and that jurisdiction in the contempt proceeding must be determined without any reference to the court's jurisdiction over the main action."

This is correct: this is exactly the position taken by petitioners.

Respondent then continues:

> "The fallacy in this contention is that a civil contempt proceeding, such as is here involved, instituted to compel obedience to court orders issued for the protection and enforcement of the rights of a party litigant, is not an independent action; on the contrary, the authorities consistently hold that such a proceeding is ancillary to and a part of the main action. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328-329. It seems clear that jurisdiction over the subject matter in the main action suffices to establish the jurisdiction of the court over contempt proceedings for disobedience of orders issued in the main action."

Inherent in the above quotation is the admission that if the contempt proceedings are separate proceedings, petitioners are correct in their position, which is that in the contempt proceedings they were denied the rights of due process guaranteed by the Constitution of the United States, and thus certiorari should be granted. The cases cited by respondent do not support his conclusion that contempt proceedings are part and parcel of the principal action; however, the right of contemnors (strangers to the "prin-

cipal action") to a separate and independent right of appeal should be conclusive as to the separate nature of the contempt proceedings. This point of view was taken by the Circuit Court of Appeals in the instant case when it denied the motion to dismiss the appeals; however, in deciding the case on its merits, the Court of Appeals erroneously departed from the proper legal basis on which it had determined the motion to dismiss. On any such appeal the appellate courts must follow the usual criteria in reviewing the decision of the lower court upon the record presented on appeal; the minimum matters to be considered are:

(A) Does the record on appeal show jurisdiction?

(B) Does the record show that the particular acts alleged to be contemptuous are proven?

The record in the cases before this Court is not merely silent as to jurisdiction; it affirmatively establishes lack of jurisdiction. Unless the general jurisdiction to hear and determine in the "principal action" may be transferred in some way to the separate contempt proceeding, there can be no question as to the denial of petitioners' civil rights in this case.

For his conclusion that civil contempt proceedings are not separate from the action out of which they arose, respondent cites only two cases. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445, and *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328-329. An examination of these cases indicates not merely that they do not support respondent's contention, but on the contrary indicates that contempt proceedings are separate.

In *Bessette* v. *W. B. Conkey Co.*, *supra*, the Court first states:

"In the case at bar the controversy between the parties to the suit was settled by final decree, and from

> that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet, being no party to the suit, he was found guilty of an act in resistance of the order of the court."

The Court then states:

> "Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the circuit court of appeals."

Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445, involved the violation of an injunction. The court merely held that if the injunction proceeding had been settled, there could be no contempt for a violation of the injunction. Here, nevertheless, the court still recognized the possibility of separate proceedings in relation to contempt, stating:

> "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled,—of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings."

A review of pertinent cases indicates that the rule is quite definitely established that contempt proceedings are separate and apart from the proceeding out of which they arose. The United States Supreme Court in *Hayes* v. *Fischer*, 102 U. S. 121 (prior to statutes increasing its appellate jurisdiction) stated:

> "If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error

> or appeal. This was decided more than fifty years ago * * *"[1]

The efforts of respondent to confuse the "principal case" with that involving petitioners is again clearly indicated in footnote 5, on page 8, of respondent's brief in opposition, where it is said, in part:

> "* * * petitioners sought to force the court to follow an order of proof which it had refused to follow in denying the motion to dismiss, that is, to try the question of coverage separately and in advance of the issue of compliance. If petitioners were correct in their contention, witnesses would thus be in a position to take out of the court's hands the determination of the order of proof and the course of the trial."

This is not petitioners' contention and has nothing to do with the case before this Court. Petitioners' contention is, that prior to being sent to jail, the United States District Court is required to find every element essential to the offense charged, including primarily the court's jurisdiction, and that this must appear in the record on appeal.

Petitioners' position, which they have continuously asserted, is that the record in the separate proceedings involving them affirmatively shows lack of jurisdiction. Thus the references in respondent's brief as to what the district court may have had before it, or what may be gleaned from

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[1] Following are additional citations indicating the general rule: *Robertson* v. *State*, 104 So. 561, 564:

> "A contempt proceeding raises an issue outside of the pending cause. While in some cases, it may, in a sense, be collateral to the main cause, it is not a part of that cause. It is a separate, independent proceeding, governed by well-established rules of procedure, and has not proper place in the record of the main cause."

Cheney v. *Richards*, 155 A. 642, 644:

> "Proceedings for contempt based upon disobedience to a decree are independent and separate from the original suit."

the pleadings in the record as to the nature of the principal case, have no bearing here. (Res. Br. pages 2 and 14). The principal pleadings of respondent in the case before this Court are the "Application for Adjudication in Contempt" (R. F. 41), and the "Application for Order to Show Cause, etc." (R. S. 15). An examination of these documents (which may roughly be termed the complaints in the proceedings with which we are concerned) will indicate that there are no allegations contained therein to sustain jurisdiction even if in such proceedings an argument could be made that allegations in pleadings equivalent to complaints would sustain jurisdiction.

The only place in respondent's brief where respondent really comes to grips with the true issues presented, is, as indicated, in footnote 13 on page 15. The legal conclusion upon which respondent rests is erroneous and respondent's brief thus fails entirely to meet the issues presented, and certiorari should be granted as prayed for.

Respectfully submitted,

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